IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SALES TAX REFERENCE No. 5 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL

HON'BLE SMT.JUSTICE ABHILASHA KUMARI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Applicant(s)
Versus
SAYAJI MILLS NO 1 - Opponent(s)

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Appearance :
MR SUNIT S SHAH, GOVERNMENT PLEADER with MS KRINA P.CALLA, AGP, for Applicant(s)
MR JAGDISH S JOSHI for Opponent(s)

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CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL

and

HON'BLE SMT.JUSTICE ABHILASHA KUMARI

Date : 06/12/2006

ORAL JUDGMENT (Per: HON'BLE MR.JUSTICE J.M.PANCHAL)

1. The Gujarat Sales Tribunal at Ahmedabad has referred the following questions of law for decision of this Court under Section 69 of the Gujarat Sales Tax Act, 1969 (“the Act” for short).

“(1) On the facts and in the circumstances of the case, whether the Tribunal is not right in holding that the transfer of the entire mill by the Opponent Company viz. M/s.Sayaji Mills Limited to Shri Keshariya Investment Limited was not a sale of goods, within the meaning of section 2(12) of the Act, effected during the course of the Opponent Company's business and, therefore, the sale of proceeds were not liable to attract any tax under the Gujarat Sales Tax Act, 1969?

(2) On the facts and in the circumstances of the case, whether the Tribunal is not right in holding that as the entire sale has been effected on the basis of lump sum consideration for transferring the concern, and not only

right, title and interest are transferred, but even the debts and liabilities have also been sold and as stock-in-trade together with other moveables got to be transferred to the purchaser, Shri Keshariya Investment Limited, such a transfer cannot be treated as a sale of goods during the course of business of the Opponent Company?

(3) On the facts and in the circumstances of the case, whether the Tribunal is not right in holding that the amount of sale in question shall be excluded from the taxable turnover of the opponent Company for the period under consideration?

(4) On the facts and in the circumstances of the case, whether the Tribunal is not right in removing the levy of sales tax of Rs.64,817.31 and as a consequence thereof, in removing the penalty imposed under the provisions of section 45(6) of the Gujarat Sales Tax Act, 1969?"

2. In order to understand the scope of questions referred to this Court for

decision, it would be relevant to notice certain basic facts. The opponent, i.e. M/s.Sayaji Mills Limited No.1 (“the Mills Company” for short) was incorporated under the provisions of the Companies Act, 1956. It was a registered dealer within the meaning of the Act. The opponent-Mills Company was situated at Baroda. The Mills Company agreed to transfer the entire concern to Shri Alokprasad Jain pursuant to an agreement dated October 8, 1972. Later on, at the instance of Shri Alokprasad Jain, the Mills Company executed the sale-deed dated May 26, 1973 in favour of Shree Keshariya Investment Limited to which four schedules were appended. The first schedule related to the immovable properties that were transferred whereas the second schedule mentioned the dead stock of machinery of various departments of the Mills Company and the third schedule referred

to particulars of the term loans and other facilities which were availed of by the Mills Company whereas the fourth schedule related to the immovable properties including the immovable machineries transferred by the Mills Company to the purchaser. On Return being filed, the assessment for the period from April 1, 1973 to March 31, 1974, relating to the Mills Company was taken up by the Sales Tax Officer, Baroda. By an order dated March 18, 1978. The Sales Tax Officer calculated the gross sales of the Mills Company at Rs.1,80,23,823/-. From the abovementioned sum, the S.T.O. Deducted the sales of cloth amounting to Rs.1,57,33,452/- and held that the net taxable turnover of sales of the Mills Company was Rs.20,90,371/-. It may be mentioned that this amount was the sale price of the stock-in-trade of various current assets that were sold by the

Mills Company to the purchaser. The submission made by the Mills Company that it was not a transfer/ sale of the assets in the course of business by the Mills Company but it was the sale of entire business and current assets which would not be covered by Section 2(12) of the Act was negatived by the S.T.O. The S.T.O. Directed the Mills Company to pay a sum of Rs.64,817.31 ps. towards tax and Rs.61,056.92 ps. as penalty under Section 45(6) of the Act.

3. Feeling aggrieved, the Mills Company preferred First Appeal before the Assistant Commissioner of Sales Tax, Baroda. From the record, it is evident that two contentions were raised by the Mills Company for consideration of the first appellate authority. The first contention raised was that the various current assets aggregating to

Rs.20,90,371/- which were transferred along with other assets to Shree Keshariya Investment Limited were not sales of goods and therefore, the said amount could not have been included in the amount of turnover as per the provisions of the Act. The second contention raised was that the penalty that was imposed under Section 45(6) of the Act was illegal as it could not have exceeded the period of eighteen months. The Assistant Commissioner rejected the first contention but accepted the second one and directed that the penalty would be levied for a period of eighteen months. Feeling aggrieved, the Mills Company invoked the appellate jurisdiction of the Tribunal. The Tribunal considered different terms of the sale-deed and after hearing the learned counsels for the parties, held that the Mills Company was not a dealer qua sale of

the entire business occasioned as a result of discontinuance of business and that sale of the entire Mills Company to Shree Keshariya Investment Limited did not amount to sale of goods as defined in Section 2(12) of the Act, effected during the course of the business. In view of this finding, the Tribunal held that the sale proceeds realized by the Mills Company were not liable to tax.

4. Thereupon, the Revenue invoked the provisions of Section 69 of the Act and as mentioned above, the Tribunal has referred the four questions for the decision of this Court.

5. It is settled law that findings of facts recorded by the Tribunal are final because the Tribunal is the final fact finding authority. As observed earlier, the Tribunal has, in terms, held that the sale of the entire

business had occasioned as a result of discontinuance of business, which means that the Mills Company had transferred its entire concern not as a going concern but the transfer was effected after the closure of the concern. Therefore, with the consent of the learned advocates for the parties, this Court proposes to re-frame the questions No.(1) and (2) referred to this Court as under:

(i) On the facts and in the circumstances of the case, whether the Tribunal is not right in holding that the transfer of the entire Mill by the Opponent Company viz. M/s.Sayaji Mills Limited, after the closure of the business, to Shri Keshariya Investment Limited, was not a sale of goods, within the meaning of section 2(12) of the Act, effected during the course of the Opponent-Company's business and, therefore, the sale of proceeds were not liable to attract any tax under the Gujarat Sales Tax Act, 1969?

(ii) On the facts and in the circumstances of the case, whether the Tribunal is not right in holding that as the entire sale effected included the debts and liabilities, together with other movables, such a transfer cannot be treated as a sale of goods during the course of business of the Opponent-Company?

6. This Court has heard Mr.S.S.Shah, learned Government Pleader with Ms.Krina P.Calla, learned Assistant Government Pleader, for the Revenue and Mr.J.S.Joshi, learned counsel for the opponent-Mills Company, at length and in great detail.

7. From the questions referred to this Court for decision, it is evident that what is required to be considered by the Court is whether the Judgment of the Tribunal holding that the sales or transfer of the opponent, i.e. M/s.Sayaji Mills Limited, after the business was closed down, was not in

the course of business and so not taxable is correct. Looking to the scheme of the Act, it becomes very clear that the transfer of the goods after the business of the Mills Company had been closed down would not be the sale of the articles or goods in the course of the business. The Mills Company was bound to pay tax on the turnover of sales effected during the course of its business but there could not be any such turnover of sales when the business is closed down and the entire business is transferred to a party. At this stage, it would be relevant to notice the decision of the Division Bench of this Court rendered in *Sadhna Textile Mills Pvt. Ltd. v. The State of Gujarat – G.S.T.B. 1992 (H.C.) Page 183*. In the said case, the Gujarat Sales Tax Tribunal had referred the following question at the instance of the assessee to the High Court:

"Whether on the facts and in the circumstances of the case, and considering the scheme for levy of tax under the Gujarat Sales Tax Act, 1969, the transaction worth Rs.2.94 crores in respect of transfer of plant and machinery constituted a sale exigible to tax under the Gujarat Sales Tax Act, 1969?"

Therein, the assessee was engaged in the business of spinning, weaving and processing. It entered into an agreement with the Bombay Dyeing and Manufacturing Company Limited to sell its right, title and interest in the land over which its Mill was situated and also for sale of its plant, machinery and equipments. The assessee authorized the purchaser to make necessary application or to take appropriate proceedings for payment of sales tax, if any, because the liability to pay tax on sale of plant, machinery, equipments and articles was that of the purchaser. Thereupon, the purchaser made an application in the name of the assessee under Section 62

of the Act for determination of the following question:

"Whether the sale of Rs.2.94 crores of plant and machinery, constituting our Spinning Mill at Ranjit Sugar Road, Jamnagar in terms of our agreement dated 5th November, 1980 with the Bombay Dyeing & Mfg. Co. Ltd. Attracts any tax?"

The Deputy Commissioner of Sales Tax, who heard the application, held that it being a sale of movable property, made not after but with a view to close the business of running the spinning Mill, was a business sale and thus liable to tax. The assessee filed an Appeal before the Gujarat Sales Tax Tribunal but failed. In Reference, the High Court negatived the contention of the assessee that sale was made after closure of the business and held that the sale was effected before the business was actually closed down. However, while deciding the liability of the assessee to pay the tax, the

Division Bench referred to two decisions rendered by the Madras High Court and one rendered by the Madhya Pradesh High Court and held as under:

"....He further submitted that if the sale was thus made after closure of the business, then in view of the settled legal position, such a sale would not be exigible to tax under the Act. In support of his contention Mr. Pathak relied upon two decisions of the Madrash High Court and one decision of the Madhya Pradesh High Court. They are ***The State of Tamil Nadu vs. Therme Electrics*** *(1977) 39 STC 317;* ***Commissioner of Sales-tax, M.P. vs. L.Vasudeo Rao*** *(1981) 48 STC 447 and* ***Monsanto Chemicals of India (P) Ltd. v. The State of Tamil Nadu*** *(1982) 51 STC 278. We do not refer to those decisions because we are in agreement with the proposition that if a sale is made by a dealer after closure of his business, then the same will not be exigible to tax under the Act....."*

8. In view of the settled legal position emerging from the above-quoted Division

Bench judgment of this Court, the Court is of the opinion that the opponent was not a dealer qua the sale of the entire business occasioned as a result of discontinuance of business and that the sale of the entire Mill by the opponent to Shree Keshariya Investment Limited did not amount to sale of goods as defined in Section 2(12) of the Act, effected during the course of the opponent's business and therefore, the sale proceeds were not liable to any tax.

9. For the reasons stated above, this Court answers the questions referred to the Court in the negative, i.e. in favour of the assessee and against the Revenue. There shall be no orders as to costs.

(J.M.Panchal, J.)

(Smt.Abhilasha Kumari, J.)

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